IN THE
SUPREME COURT OF MISSOURI

No. SC84953

IAN MCEUEN, by and through next friend GARY MCEUEN, and MISSOURI PROTECTION AND ADVOCACY SERVICES, INC.,

Appellants,

v.

MISSOURI STATE BOARD OF EDUCATION AND MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Thomas J. Brown, III, Judge

RESPONDENTS' BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

CURTIS F. THOMPSON
Assistant Attorney General
Missouri Bar No. 25171

7th Floor, Broadway State Office Building
221 West High Street
P.O. Box 899
Jefferson City, MO 65102
Telephone: 573-751-5406
Telefax: 573-751-5660

Attorneys for Respondents

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STATEMENT OF FACTS

The statement of facts appearing at pages 8-13 is generally accurate, but it contains inappropriate argument. For example, it states that the challenged statute had the effect of "dramatically deviating from the original purpose of the bill" (emphasis added) at page 8. It also states that "the sole purpose of SSHB 2023 was to change the special education policy in Missouri" (emphasis added), also at page 8 of the statement of facts.

The statement of facts also contains a misstatement appearing at page 13 of the brief. Appellants state that the 66 representatives who wrote a letter urging a veto did so "because they did not know what was in it due to the manner in which it was amended and presented to them." There are no facts in the record to support that statement. The letter from the representatives states, in its entirety, "We the undersigned members of the House of Representatives object to the handling of SS HB 2023. We urge the Governor to veto this measure and send this aforementioned bill to Interim Committee this summer for further study." L.F. 84-85. There is nothing in the letter that supports appellants' description in their statement of facts that the signators "did not know what was in it [SSHB 2023] due to the manner in which it was amended and presented to them." Appellants' Brief at 13.

Appellants include the stipulation of facts and a description of the circuit court's decision, Appellants' Brief at 9-12. Title 20 of the United States Code, §§ 1400-1419 (IDEA), provides that states that accept federal funding for education must provide a free appropriate public education to students with disabilities. Section 162.670, RSMo, prior to the passage of SSHB 2023 read, in pertinent part, that it was the policy of the state to provide "special

educational services sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children" and was changed to state that the state's policy was to provide "a free appropriate education consistent with the provisions set forth in state and federal regulations implementing the Individuals with Disability Education Act (IDEA), 20 U.S.C. Section 1400 et seq. and any amendments thereto." L.F. 80.

STANDARD OF REVIEW

In reviewing the entry of summary judgment, this Court reviews the record *de novo* in the light most favorable to the nonmoving party. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993). However, statutes are presumed to be constitutional. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). In reviewing a statute against a constitutional challenge, this Court is to construe any doubts regarding that statute in favor of its constitutionality. *Id.* Unless an act "clearly and undoubtedly" violates any of the above constitutional limitations, that act shall be upheld. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

ARGUMENT

I

Senate Substitute for House Bill 2023 (SSHB 2023) was passed with no change in original purpose. (This argument addresses point I in appellants' brief.)

Any analysis of any constitutional challenge to a statute starts with the propositions that a statute is presumed constitutional, see *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984), and that a party challenging a statute's constitutionality bears a heavy burden, *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. banc), *cert. denied*, 97 S.Ct. 653, 429 U.S. 1029, 50 L.Ed.2d 632 (1976); *State ex rel. Mathewson v. Bd. of Election Comm'rs of St. Louis County*, 841 S.W.2d 633 (Mo. banc 1992). A statute will not be held unconstitutional unless it clearly and undoubtedly contravenes the Constitution. *State v. King*, 303 S.W.2d 930 (Mo. 1957). Mo. Const. art. III, § 21 provides:

> The style of the laws of this state shall be: "Be it enacted by the General Assembly of the State of Missouri, as follows." No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house.

This Court has always reviewed legislative compliance with Mo. Const. art. III, § 21 taking a realistic approach to it, rather than the narrow approach urged by appellants. The

change in purpose prohibition is not designed to "inhibit the normal legislative process, in which bills are combined and additions necessary to comply with legislative intent are made." *Blue Cross Hosp. Service, Inc. of Missouri v. Frappier*, 681 S.W.2d 925, 929 (Mo. banc 1984). The test for compliance with Mo. Const. art. III, § 21 is whether all of the provisions of a bill fairly relate to the subject expressed in its title, have natural connections therewith, or are "incidents or means to accomplish" the expressed purpose. *Blue Cross Hosp.*; *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994). Amendments that are germane and reasonably relate to the object of legislation are not prohibited, even if those amendments introduce new matter to the underlying bill. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 38 (Mo. banc 1982). In *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000), this Court interpreted the purpose of a statute with a title "relating to transportation" to include local control of billboards in concluding there was no constitutional violation. *Dillon*, 12 S.W.3d at 327.

A dispassionate and reasoned analysis of the standards established by this Court is necessary to prevent an inadvertent reversal of the discretion that is properly lodged in the legislative process. The authority of a reviewing court is to interpret statutes, not make them. *Eckenrode v. Dir. of Revenue*, 994 S.W.2d 583 (Mo. Ct. App. 1999). However, that is precisely what appellants are asking of this Court under the guise of this challenge.

Appellants in effect argue that the changes made in SSHB 2023 were not germane to the original bill. Thus, they contrast the original bill's concern with hearings for appeals of discipline meted out to handicapped students and the enacted bill's expended concerns with the

policy of the state regarding all children receiving special services. They claim that the expansion impermissibly changed the purpose of the bill.

However, appellants have failed to clear the hurdles to justify overturning the decision below. Both the original bill and the truly agreed to and finally passed bill dealt with the treatment of handicapped children in the educational setting. HB 2023 involved procedures when handicapped students were subject to a "disciplinary change of placement" for inappropriate behaviors. L.F. 78. SSHB 2023 identified the state policy that educational programs must afford handicapped students a free appropriate education consistent with the requirements of IDEA. L.F. 80. Both bills, therefore, dealt with the treatment of handicapped students in the educational setting. The statutory changes appear in the same chapter, 162.

SSHB 2023 introduced new matter, but it did not involve a change in purpose as contemplated by Mo. Const. art. III, § 21. The discussion by appellants in this regard confuses the concept of "educational placement" in the educational setting with physical location. When the changes were added, it broadened the bill to affect not only all handicapped students when facing discipline, but all handicapped students regarding the state policy for such placement. The term "educational placement" refers only to the general type of educational program in which a child is placed, not the physical location of the services. *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 753-54 (2nd Cir. 1980). See also *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989) and *Christopher P. v. Marcus*, 915 F.2d 794 (2nd Cir. 1990), wherein those courts held that a student's placement under the IDEA does not involve the physical location of the services

to the student but the type of services provided the student. There is no change in "educational placement" as contemplated in IDEA when a student is transferred to a different school within the same school district. *Concerned Parents*, 629 F.2d at 753-56.

The proposed changes in both bills are narrowly tailored to apply to only handicapped children and only in the educational arena. Both bills dealt with the "placement" of students with handicaps, whether due to disciplinary issues or because of a policy decision by the General Assembly. This is no more extraordinary than the changes in *Missouri State Med. Ass'n v. Missouri Dep't of Health*, 39 S.W.2d 837 (Mo. banc 2001), wherein this Court upheld a statute which had a title "relating to health services," even though the original title was "relating to insurance coverage for cancer early detection." *Missouri State Med. Ass'n*, 39 S.W.2d at 839. Added to the original provisions requiring insurance coverage for early detection of cancer were matters related to confidentiality of HIV patients; insurance for mental illness and chemical dependency; explanation of benefits by health insurers; referral information by health insurers and providers; pre-operation information on the advantages, disadvantages, and risks including cancer, of breast implantation; and the establishment of a health insurance advisory committee. Such changes to the bill during the legislative process fairly related to a broad original purpose and the same is true regarding SSHB 2023. *Id.* The Court rejected the same arguments made herein, reaffirming the proposition that laws have a strong presumption of validity. *Missouri State Med. Ass'n*, 39 S.W.2d at 839-41.

A notable example of the Court's deference to the legislative process is *Stroh Brewery Co. v. State*, 954 S.W.2d 323 (Mo. banc 1997). There this Court considered a bill that as

introduced contained one section "relating to the auction of vintage wine, with penalty provisions." *Stroh*, 954 S.W.2d. at 325. During the legislative process, that bill took on additional amendments and eventually grew to nine sections, including the original section relating to vintage wine and other topics such as marketing of alcohol, Sunday licenses for sale of alcohol, age requirements for sellers of alcohol, labeling requirements for malt liquor, and additional penalties for violations of the Liquor Control Law. HCS/SB 933 (1996). Due to these expanding amendments, the finally passed bill was entitled "an act .. . relating to intoxicating beverages." *Stroh*, 954 S.W.2d at 325.

In *Stroh*, the court recognized that the original purpose of a bill must be determined at the time of introduction. *Stroh*, 954 S.W.2d at 326. Even though the original bill dealt only with the auction of vintage wine, the *Stroh* court held that other sections relating to liquor control could be added without changing its original purpose, even if the title was expanded, when those sections were generally consistent with the overarching purpose of liquor control. *Stroh*, 954 S.W.2d at 326.

Compare the facts in *Stroh* to the facts in this case. There was one addition and one deletion in SSHB 2023 that was in the same statutory provisions as the original bill regarding educational placement of handicapped students. The language in HB 2023 included language concerning "disciplinary change of placement." L.F. 78. SSHB 2023 involved the appropriate educational placement consistent with IDEA. L.F. 80. Using *Stroh* as the standard, there is no violation of the change of purpose provisions in the enactment of SSHB 2023.

This Court held in *Stroh* that only clear and undoubted language limiting the purpose will support a Article III, § 21 challenge. *Stroh*, 954 S.W.2d at 326. Deference is to be afforded legislative determinations to change the law. *Missouri State Med. Ass'n*, 39 S.W.2d at 839. See, also *C.C. Dillon Co.*, 12 S.W.3d at 327. The original title of HB 2023 did not contain the type of limiting language such as "for the sole purpose of," as was noted by the Court in *Stroh*, 954 S.W.2d at 326. Therefore, the additions to the bill did not change its purpose. "When alternative readings of a statute are possible, we must choose the reading that is constitutional." *Id.* Based upon these prior holdings, it is evident that there was no change in purpose in derogation of Article III, § 21.

II.

The title to SSHB 2023, "relating to the appropriate educational placement of students," was not under inclusive in violation of Mo. Const. art. III, § 23 in that the "placement" of students in this context dealt with the types of programs mandated for handicapped students, which SSHB 2023 did address, and, therefore, was proper. (This argument addresses that part of point II in appellants' brief that argues the title of SSHB 2023 was under-inclusive.)

Mo. Const. art. III, § 23 provides: "No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated." The standards for reviewing legislation when a challenge is based upon a clear title challenge is similar to a change of purpose challenge. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 4 (Mo. banc 1984). The appellants challenge SSHB 2023 because the title was changed from a reference to "resolution conferences" to a reference to "appropriate educational placement of students," which accurately described the bill in its final form. L.F. 77 and 80. Attacks against legislative action founded on constitutionally-imposed procedural limitations are not favored, and such limitations are interpreted liberally to uphold the action, unless it clearly and undoubtedly violates such limitations and courts have consistently avoided interpretations that will limit or cripple legislative enactments any further than is made necessary by the absolute requirements of the law. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

At page 45 of their brief, appellants invoke § 23 and assert that "the titles of the original HB 2023 and the Senate Substitute for HB 2023 give no indication that a new and separate subject was added." However, the title of SSHB 2023 did advise the legislators what it contained. The complete title of HB 2023 was "[t]o repeal sections 162.961 and 162.962, RSMo, and to enact in lieu thereof two new sections relating to resolution conferences." The title to SSHB 2023 was "[t]o repeal sections 162.670, 162.675, 162.961 and 162.962, RSMo, and to enact in lieu thereof four new sections relating to the appropriate educational placement of students." L.F. 77 and 80, respectively.

The amendments to HB 2023, coupled with the title change to an act relating to the appropriate educational placement of students, did not violate the clear title requirements and that title certainly was not under-inclusive when it included "educational placement" in its title. See page 12, *infra*, regarding what is meant by "placement" in this context of IDEA.

It is appropriate to change the title of an act during the legislative process when additional provisions are added to the act, particularly when the new title reflects the general contents of the bill. *Westin Crown Plaza Hotel Co*., 664 S.W.2d at 6-7. Changes in a bill's title are necessary to accurately reflect the real scope of the legislation. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982).[1]

[1]Although appellants do not assert that the title change violated the Constitution, they claim that the first bill applied to a limited number of students, while the second bill applied to all handicapped students. See, e.g., page 45 of appellants' brief. They simply are incorrect.

Both bills applied to all handicapped students. HB 2023 applied to all handicapped students because they all might face disciplinary issues, while SSHB 2023 applied to all handicapped students in the adoption of statutory language identical to that appearing in IDEA.

The title of SSHB 2023 does indicate the contents of the act, both by general reference to the subject and by specific reference to the provision being amended. The method of how SSHB 2023 was adopted is surely no more spectacular than that in *Stroh Brewery Co. v. State*, 954 S.W.2d 323 (Mo. banc 1997) or *Missouri State Med. Ass'n v. Missouri Dep't of Health*, 39 S.W.2d 837 (Mo. banc 2001).

Regarding SSHB 2023, the change in the title to relating to educational placement was necessary to accurately reflect the provisions in SSHB 2023. Appellants argue that the bill's title was under-inclusive. It is not. It refers to "placement," and the "placement" of handicapped children in the educational setting relates to the types of programs the student receives, not the physical setting of the student. See p. 12, *infra*. Moreover, rather than tackle the language of the title, appellants review the history of federal and state court review of the IDEA. Appellants' Brief at 35 to 37. That discussion may be intellectually enlightening, but it demonstrates that appellants are seeking to undo legislation because appellants disagree with that policy decision. It is up to the General Assembly to determine policy and it is for the courts to apply the law as written. *Brinkmann v. Common School Dist. No. 27 of Gasconade County*, 238 S.W.2d 1 (Mo. Ct. App. 1951). Appellants want this Court to reverse the policy decision reflected in SSHB 2023 and, in effect, "unlegislate." However, this Court is obligated to affirm the constitutionality of SSHB 2023 because appellants completely fail to show any constitutional infirmities with that bill. As revealed in appellants' own suggestions, they are asking this Court to violate separation of powers doctrine and repeal legislation that they believe is ill-conceived and misguided.

This Court has stated that when alternative interpretations are possible and one interpretation results in constitutionality, then that is the interpretation that is to be applied. *Stroh*, 954 S.W.2d at 326. All the changes proposed in HB 2023 and enacted in SSHB 2023 relate to the treatment of handicapped children in their educational environment. All the changes are to the same chapter, Chapter 162, RSMo. The appellants' reliance on cases such as *Home Builders Ass'n of Greater St. Louis v. State*, 75 S.W.3d 267 (Mo. banc 2002), emphasizes that SSHB 2023 was, in fact, enacted in a constitutional fashion. In *Home Builders*, the bill under review grew from 15 pages to 90 pages, and from 13 changes in one chapter to 70 changes in 15 chapters. See *Home Builders* at 268. In this case, there is one chapter involved in the bill as introduced and as adopted, with two changes added to the original bill and all the changes are interrelated to the same subject, the proper educational placement of handicapped students.

III.

The circuit court considered all proper evidence and rejected the arguments of appellants that misrepresented the assertions made by individual legislators after their votes had been made. (This argument addresses that part of point II in appellants' brief that argues the circuit court failed to consider the actions of some legislators after SSHB 2023 was adopted.)

Appellants overstate and misstate actions taken subsequent to the enactment of SSHB 2023 by some members of the legislature and the governor in a veiled attempt to beguile this Court into believing there were constitutional violations when none occurred.[2]

[2]Appellants also made much of the fact that SSHB 2023 was enacted without a public hearing. See page 39 of their brief. However, there is no constitutional requirement for any public hearing and appellants can cite to no authority mandating such hearings. It is inappropriate to engraft mandatory requirements when there is no authority to support such a mandate. *Wilson v. McNeal*, 575 S.W.2d 802 (Mo. Ct. App. 1978). However, that is precisely

Appellants misstate what the 66 representatives that requested the governor to veto the bill said in their request. Appellants assert that the 66 representatives requested the veto because they did not know "the true nature of the Senate Substitute HB 2023." See appellants' brief at page 38. However, their letter makes no reference to any purported change of purpose. The only reason given is to the "handling of SSHB 2023." L.F. 84-85.

The "evidence" simply does not go as far as appellants assert. They would have this Court believe that the representatives did not read the bill, did not understand the bill, and did not give thoughtful consideration to their vote. Respondents reject that characterization of the actions of the legislators who signed the petition or wrote the letter. Nothing in the petition states that any of the representatives claim the original purpose of the legislation had changed or that the title was under-inclusive, that the representatives did not know the contents of the bill, that they did not know the purpose of the bill, that they did not know that the maximization standard was being repealed, or that they were mislead or surprised by the contents of the bill that they voted for. All that can be taken from the letter and the petition is that certain representatives urged veto because of the "handling" of the bill in a "crafty" manner. That does not rise to a constitutional violation.

We also know, however, that the other 97 representatives did not request a veto nor "object to the handling of SSHB 2023." There can be as many reasons that a member of the

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what appellants are attempting to do under the guise of their challenge.

General Assembly votes on a measure as there are members of that body. Statements by members are neither conclusive nor persuasive evidence when courts are required to interpret a statute. *Missourians for Honest Elections v. Missouri Elections Comm'n*, 536 S.W.2d 766, 775 (Mo. Ct. App. 1976). In any event, testimony of a member of the General Assembly regarding the meaning of legislation is inadmissible. *Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266 (Mo. Ct. App. 2000). Appellants' efforts to circumvent that prohibition is transparent and the circuit court properly rejected their arguments on this regard. Because such testimony is inadmissible, the circuit court did not have any reason to reference it in its order.

CONCLUSION

There was no change in purpose as appellants asserted. The title "relating to educational placement" is certainly broad enough to cover the appropriate placement of handicapped students in the educational setting. The circuit court properly rejected the "evidence" submitted by appellants regarding statements made by legislators after the vote on SSHB 2023. Because the changes to HB 2023 did not change the purpose of the legislation and did not make the title misleading, this Court should affirm SSHB 2023.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Curtis F. Thompson
Assistant Attorney General

Missouri Bar No. 25171

7th Floor Broadway State Office Building
221 West High Street
P.O. Box 899
Jefferson City, MO 65102
Telephone: 573-751-5406
Telefax: 573-751-5660

Attorneys for Respondents

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) The attached brief complies with the limitations contained in Rule 84.06(b) of this Court in that it contains 4,100 words, excluding the cover, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) The floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief, were mailed postage prepaid, this _____ day of April 2003 to:

Michael H. Finkelstein, Managing Attorney
Missouri Protection & Advocacy Services
920 South Country Club Drive
Jefferson City, MO 65109
Attorney for Appellants

_____

Assistant Attorney General

APPENDIX

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